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Supreme Court, U. S.
FILED
JUL 1 1972
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IN THE

Supreme Court of the United States

1971 - October Term
No.

ANTONIO SEGURA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on the 21st day of March, 1972, which affirmed a judgment of conviction upon the verdict of a jury before the Honorable John M. Cannella, in the United States District Court for the Southern District of New York.

Petitioner was convicted of conspiracy to import heroin into the United States, in violation of Title 21, United States Code, Section 173 and 174, and receipt of illegally imported heroin in violation of Title 21, United States Code, Sections 173 and 174.

Petitioner was sentenced to a term of 18 years on each count to run concurrently.

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Second Circuit was entered on March 21, 1972, in open Court. No opinion was filed.

A notice of motion dated May 10, 1972 for leave to file a petition for rehearing, with a suggestion for petition for rehearing in banc, was granted on May 12, 1972.

Petition was to be filed by May 26, 1972.

A petition for rehearing was filed and the petition for rehearing with a suggestion for petition for rehearing in banc was denied on June 2, 1972.

Jurisdiction of this Court is invoked under Title 28 Section 1254(1) United States Code.

STATEMENT OF THE CASE

This petition is a continuation of factual circumstances which revolve around the discovery of 93-1/2 kilos of heroin valued at $10,500 per kilo.

The narcotics were stored in the rear recesses of a Citroen automobile and shipped from France to Spain, Puerto Rico, Mexico, Texas and finally to New York City.

The car was accompanied by the two French nationals named defendants in the

indictment.

In addition two other French nationals were in New York City at the time of its arrival.

Another named defendant, Taillet, arrived in New York independently of the other persons and the car.

Taillet's mission, performed in consideration of $5,000, was to meet the seller's representatives and the buyer and arrange a transfer of the drugs and money.

Petitioner was named as the purchaser of the drugs.

The buy and sell operation was in "cloak and dagger" style with identifying key-chains and keys, pre-transfer observations,

and clandestine meetings in hotel lobbies and lounges.

After a transfer of the drugs and some difficulty in the required payments, Taillet was arrested.

The entire plot came to light when Taillet defected and became a Government witness.

As Taillet, the Government's star witness told it, he was a cabaret entertainer who fell in with a bad benefactor.

This benefactor, a named co-conspirator, Loule, who Taillet saw periodically over the years in France, suggested the present mission to Taillet. One reason for this might be that Taillet had successfully performed a

money smuggling mission for Loule several years back involving $100,000 carried from Canada to France, at a fee of $2,000 for Taillet.

Although Taillet knew Loule to have a reputation as a gangster and trafficker in drugs, nevertheless Taillet testified about his heartfelt belief that there could not be any violation of the law by merely exchanging valises with money and whatever else was in them, in New York City.

However, Taillet did admit to believing that drugs were involved.

Taillet said he realized that he was deeply involved in a crime after conversing with a Frenchman while in jail.

Taillet generally portrayed himself as a dupe and as a last-billed minor performer in a giant drug sale.

However, Taillet admitted another previous visit to New York on cross examination during the trial, about which he had not testified on the Government's case in chief.

This particular visit in 1969 involved a deal with a man named Tonio. Certain phone calls were made to Marseilles to and from a person named "Riccard".

The Government, among other things, spoke of Taillet in summation as a person who had no motive to lie, stating that there was no evidence that petitioner had ever seen Taillet before this transaction.

However, the Government stated the opposite at sentencing. It was admitted that Taillet had been in New York in the past on other narcotic transactions involving the petitioner.

Petitioner was arrested a short time after Taillet was apprehended.

MOTION TO SUPPRESS

Certain documents and papers and a gun were seized when a search of the petitioner's apartment took place.

Petitioner was taken to the offices of an Assistant U.S. Attorney, where petitioner claimed he waited 1-3/4 hours, he requested

and was denied a lawyer, and he purportedly consented to a search of his home because there were already agents in his home and he feared for the health of his pregnant wife and the well being of his elderly mother. Furthermore, he was afraid that the officers would injure and destroy his home.

Government witnesses corroborated that there actually were agents in the petitioner's apartment when the petitioner phoned his wife but stated that they had not conducted a search.

They stated they were invited in by the petitioner's wife, after they returned petitioner's dog, and had informed petitioner's wife that her husband had been arrested.

Petitioner disputes the claims of Government witnesses that the Assistant U.S. Attorney stated to him, as Government witnesses testified, that if petitioner did not consent an application would be made for a search warrant, which may or may not be granted.

Petitioner stated that he initially didn't want to phone his home because agents were there and the home probably had been searched already. His suspicions were confirmed when his wife told him over the phone that six to eight people were walking all over the house.

Petitioner stated the Assistant U.S. Attorney expressed a firm hope that the petitioner would not put the Assistant U.S. Attorney through the trouble of getting a search warrant.

Petitioner claimed the Assistant U.S. Attorney threatened to have his wife deported as an alien and arrested if petitioner did not fully cooperate.

The District Court denied the motion to suppress on the ground that petitioner and his wife consented to it.

ESCAPE

Evidence of a later and fairly sophisticated escape by the petitioner was presented in great detail during the trial on the narcotics charges.

Stuffed dummies with paint brush-bristle hair, a hacksaw blade, cut bars and sheet-rope

were introduced as evidence against the petitioner.

The Court charged the standard flight charge.

ALIAS

Petitioner was indicted under an alias, Winfredo Valentin, and referred to by that name throughout the trial.

Petitioner purportedly used this name when he purchased two automobiles some time after the drug transfer in question took place.

QUESTIONS PRESENTED

I. Did the Prosecution deprive the petitioner

of a fair trial and due process of law by permitting its main witness, an accomplice of the petitioner, to testify falsely, by failing to correct his testimony, and by permitting a false portrayal of the witness to be presented to the jury?

II. Did the trial court properly find a consent to search the home of the petitioner to be the unequivocal, free and intelligently given consent uncontaminated by actual or implied duress and coercion, as required by the Fourth Amendment?

III. Did the trial court deprive the petitioner of a fair trial and due process of law by accepting highly prejudicial evidence of an escape and did the Court err in

failing to charge that flight and feelings of remorse do not necessarily reflect actual guilt?

IV. Was the petitioner denied a fair trial and due process of law by the prejudicial comments of the Court upon the heinousness and evils of heroin and drug crimes?

V. Was the petitioner deprived of a fair trial and due process by the prosecutor's act of unfairly bestowing an alias upon the petitioner in the indictment?

REASONS FOR GRANTING THE PETITION

Question one accents another aspect of the duality of the role of the prosecutor.

How circumspect must a prosecutor be in presenting a defecting criminal participant as a witness for the Government, for assessment by a jury?

One fact is certain. More than ever before, law enforcement must rely on the turncoat, the defector, the informer, the in-process-of-reforming-criminal for assistance and testimony in ferreting out and prosecuting crime.

There can be no doubt that narcotics prosecutions rely on and have resorted to the use of accomplices in ever more central roles.

However, as informers, defectors and accomplices become more numerous, there mounts a serious danger of unfair prosecution

and perjury because of the self-seeking interests of co-conspirators.

Thus are the interests of defendants and the needs of the prosecutor now clashing in a struggle without guidelines.

This very battle needs re-examination at this point in time of the development of law enforcement.

This Honorable Court has no choice but to consider the "criminal defector" issue a timely matter upon which the Court should speak.

The defector, Taillet, stated that he never realized the consequences of his acts, that he had never dealt in drugs before, and that after the one international currency

smuggling transaction with Loule, he had only seen Loule infrequently.

Taillet said that Loule told him there would be no risk involved as he was only "transacting".

Taillet was portrayed before the jury as a man who knew nothing about the world of crime.

He knew he was doing something wrong, but no law could prohibit the taking of money in a valise from a car or hotel as far as he could conceive.

However, he knew it was a million dollar transaction and was being paid $5,000 for his involvement.

Only when incarcerated on West Street

did Taillet realize he was possibly facing heavy punishment for a crime.

The prosecution spoke of Taillet in summation, making the following points, in substance:

1. There was no evidence that Segura had seen Taillet before April 1971.
2. There was no evidence that Segura knew Taillet's wife.
3. Taillet didn't know people's real names in the operation - Pierrot was really Mosca, Fernand's last name was unknown, nor was Loule's last name known.
4. Taillet was not told the whole story at once.

5. Taillet had no motive to lie.

6. Taillet told the prosecutor, the prosecutor didn't tell the events to Taillet.

7. An individual does not necessarily become a despicable character simply because he decides to cooperate with the Government.

At his sentencing, the prosecution portrayed Taillet in substance as follows:

1. The evidence shows that Mr. Segura knew of Taillet's previous trips to New York, and of his prior associations with another person named Antonio.

2. Segura knew these things because Taillet had been in New York on other

narcotic transactions which had involved Segura or one of Segura's associates.

The comments by the prosecutor on sentence evidence represent a complete turnabout. Obviously the prosecution believed Taillet, its principal witness, was a regular narcotics trafficker and yet failed to make this clear to the jury.

Furthermore, the prosecution stated that Taillet did not tell the truth at trial about seeing or negotiating with the petitioner on prior narcotic deals.

It has been long settled that the knowing use by the prosecutor of perjured evidence, or the deliberate suppression of evidence,

constitute a denial of due process of law and warrants the granting of a new trial. Mooney v. Holohan, 294 U.S. 103 (1935).

Although most of the reported cases in the field have in fact involved claims of a deliberate suppression of evidence by the prosecutor, this principle of due process is not limited to cases where defense counsel chose to make a direct attack on the integrity of the prosecutor's staff. From the point of view of the defendant, of course, it matters little whether the deprivation of due process is termed willful or negligent.

If defendants are to be protected by due process, it must be equally a violation if the perjury or suppression occurs even without

the actual knowledge of the prosecutor.

In Pyle v. Kansas, 317 U.S. 213 (1942), the second landmark case in the suppression of evidence field, there were unrefuted charges that perjured testimony was offered and that favorable evidence had been suppressed by the authorities. However, as appears from the record in that case, there was no claim that the prosecutor himself had been a party either to the perjury or the suppression. This important aspect of the record in this case was emphasized by the Court of Appeals in Curran v. Delaware, 259 F.2d 707, 713 (3rd Cir. 1958), cert. denied, 358 U.S. 948, which the Court below cited and then ignored on this point. No longer, as Curran teaches, must the defendant

show that the perjury or suppression occurred with the active connivance or cognizance of the prosecutor himself (259 F. 2d at 723). It should be sufficient even if the fact of perjury or suppression does not appear until much later. See Jones v. Commonwealth of Kentucky, 97 F. 2d 335, 338 (6th Cir. 1938).

In Napue v. Illinois, 360 U.S. 264 (1959), the Court made it plain that the initial intent of the prosecutor was not material. There, the principal state witness had testified that he had received no promise of consideration in return for the giving of his testimony. The District Attorney had in fact promised him consideration, but he sat silent in the courtroom and did nothing to correct the false

testimony of the witness. However, he had not initially solicited the perjury. The Supreme Court ordered a new trial even though the false testimony related solely to the credibility of the witness. The Court stated:

> "First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney v. Holohan, 294 U.S. 103; Pyle v. Kansas, 317 U.S. 213; Curran v. Delaware, 259 F.2d 707. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v. Texas, 355 U.S. 28; United States ex rel. Thompson v. Dye, 221 F.2d 763; United States ex rel. Almeida v. Baldi, 195 F.2d 815; United States ex rel. Montgomery v. Ragen, 86 F. Supp. 382.

"The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness * * *. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N.Y.2d 554, 557; 136 N.E.2d 853, 854-855; 154 N.Y.S. 2d 885, 887:

> 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. ... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing as it did, a trial that could in any real sense be termed fair.'" (360 U.S. at 269-70).

Savvides, quoted by the Supreme Court in Napue, was also not a case of deliberate suppression in the classic sense, because the suppressed information was a matter of public record concerning which the defense counsel either knew or should have known. Savvides has thus been properly described as an example of a negligent suppression of evidence.

> "[I]t can be argued that a merely negligent suppression of evidence, going only to the credibility of a witness, is not so prejudicial a breach of the prosecutor's duty to insure defendant a fair trial as to require reversal of the conviction. The court takes the opposite tack in the Savvides case. In order to discipline the prosecutor effectively, it presumes prejudice from error." (32 N.Y.U. Law Rev. at p. 612, 1957)

See also U.S. v. Accarino, 408 F.2d

512 (2nd Cir. 1969) and U.S. v. Bonnano, 430 F.2d 1060 (2nd Cir. 1970).

Our law imposes solemn duties and responsibilities upon a public prosecutor in a criminal case.

The reported decisions, and the Canons of Ethics, fully reflect the proper concern of both the judiciary and the bar with any deviation from the strict standards and responsibilities placed by law on the public prosecutor. The Supreme Court of the United States has made it clear that the failure of the prosecutor to comply with the full measure of his duty is, in itself, a violation of due process of law. Mooney v. Holohan, 294 U.S. 103, 112 (1935). None of the reported decisions suggest that the

prosecutor may relieve himself of any of the solemn obligations imposed by law.

Stated plainly, a prosecutor must refrain from using any improper methods in order to obtain (and to sustain) a conviction. The classic statement of this principle is set forth in Berger v. United States, 295 U.S. 78 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed,

> he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Defense counsel are entitled to the knowledge of certain facts and the prosecutor has no right to withhold facts. A prosecutor may not ignore evidence which is in the accuseds' favor. United States ex rel. Montgomery v. Ragen, 86 F. Supp. 382, 387 (N.D. Ill. 1949). A prosecutor may not withhold from the Court any evidence which may be material to the defense. United States v. Schneiderman, 106 F. Supp. 731, 739 (S.D. Cal. 1952). A prosecutor may not withhold evidence by deciding

unilaterally, that such evidence would be inadmissible, or not otherwise useful to the defense.

The duty of the prosecutor to make full and frank disclosure of documentary materials in his files was well stated by the Court in United States v. Zborowski, 271 F.2d 661 (2nd Cir. 1959):

> "The requirement that the government must prove its case beyond a reasonable doubt means, at the very least, that the government itself should not, by any failure to disclose relevant evidence, prevent the defendant from producing evidence which might create the reasonable doubt. Our standards of fair play in federal criminal proceedings require that the government should present its evidence in its true colors and that it should never be a party to withholding any evidence which materially bears on the credibility of a witness it puts on the stand." (271 F.2d at 668).

The prosecutor in a criminal case has, rightly, many advantages. But if he does not comply with the full measure of his responsibility to the public and to the defendants, if he is irresponsible or negligent, our Courts should not relegate defendants as they were relegated here, to the remedy of self-help, and to the necessity of organizing their own private F. B. I., to ferret out the evidence while a cloak of silence is very carefully preserved by the prosecutor.

There can be no problem of whether the verdict might have been affected by the false portrayal of and perjury by Taillet.

That issue was raised and disposed of in Lusterino v. United States, 450 F. 2d 572

(2d. Cir.).

Taillet was basically the only witness against the petitioner.

The indictment alleges Taillet performed all of the overt acts, except one, in furtherance of the conspiracy.

The verdict clearly depended upon whether Taillet was believed or disbelieved.

Taillet well could have been viewed much differently were his prior narcotics dealings in New York with other persons properly revealed to the jury.

Taillet would not have fit the role of a misguided, peripheral participant were it a fact that he had trafficked in drugs previously.

Because Taillet's tendency to minimize

his own role went unexposed, the jury was not able to perceive that he should be skeptically viewed as to whether he maximized the petitioner's role in the plan.

It is certain that he may have maximized the petitioner's participation.

Question two deals with the problem of guidelines for determining the voluntariness of the relinquishment of the Fourth Amendment right and the consent to a search of one's home.

A consideration of the test to be applied in evaluating whether a free consent was given is involved. It is submitted that the Court should review whether the free consent test should be a "subjective" one or an

"objective" one.

"Subjective" herein will refer to the viewpoint of a person with the petitioner's makeup and circumstances, and "objective" is used to refer to the perceptions and reactions of the mythical, legal, reasonable man.

The instant fact pattern involves the not so unique situation of a defendant-petitioner in custody in the office of an Assistant U.S. Attorney. However, we also must consider the uncommon fact that allegedly a "consent" was given by telephone for a search of the petitioner's home miles away.

Furthermore, the customs agents apparently were eavesdropping on the conversation in which the petitioner purportedly

informed his wife that he had given a consent.

The Consent to search under the Fourth Amendment is a relinquishment of a constitutional right that traditionally has been protected by the Courts.

The Courts have increasingly imposed great burdens upon the prosecution to show that a consent was intelligently and freely given.

The novel combination of typical and unusual circumstances involved in the instant consent, suggest that federal law enforcement officials may have stumbled upon or deliberately developed a new procedural technique which demands judicial scrutiny and regulation.

It is the petitioner's position that he

did not unequivocably, freely and intelligently consent to a search of his home.

Clearly certain factors appear:

1. Petitioner was in custody.
2. He had requested counsel.
3. Petitioner had waited 1-3/4 hours to see the Assistant U.S. Attorney.
4. Petitioner at the time of the request for consent was truthfully told that agents were already present in his home.
5. Petitioner had spoken to his wife by phone in both Spanish and English.
6. Petitioner's wife was pregnant and present in the home.
7. Petitioner's elderly mother was also

in the home.

8. Petitioner testified that he feared his wife's health would be injured in some way and that his home might be damaged.

9. The Assistant U.S. Attorney stated that an application for a warrant could be made to the magistrate in the same building which might or might not be granted.

10. The time of the request for counsel was put in issue.

11. The consent of petitioner's wife was put in issue after petitioner testified that his wife told him over the phone that agents were already in the home

and that she believed they might destroy the premises.

12. A phone call was made to the home requesting that the agents call in to the Assistant U.S. Attorney's office.

13. Defendant expressed fear and apprehension for his home and family and only then "consented" to a search.

As a result of the questioned search, documents and a gun were found.

Consent is a waiver of the constitutional protection. Consent, therefore, makes any product of any search, no matter how unreasonable, admissible in evidence.

Because "consent" constitutes a waiver of constitutional protections: "Courts indulge

every reasonable presumption against waiver of fundamental rights." (Johnson v. Zerbst, 304 U.S. 458).

When consent is claimed by the state the burden of proof is upon the Government affirmatively to establish free and voluntary consent (Pekar v. United States, 315 F.2d 319; Hall v. Warden, 315 F.2d 483; United States v. Viale, 312 F.2d 595; Villano v. United States, 310 F.2d 680; United States v. Smith, 308 F.2d 657, 663; United States v. Como, 340 F.2d 891).

The general rule is that consent must be given freely and intelligently. It must be unequivocal. It must be uncontaminated by any form of duress or coercion actual or

implied (Amos v. United States, 255 U.S. 313; Channel v. United States, 285 F.2d 717; Judd v. United States, 190 F.2d 649; Higgins v. United States, 209 F.2d 819).

The prosecution must show that the strict requirements of a waiver, i.e., the voluntary relinquishment of a known right, have been met, before consent to waive the protection of the Fourth Amendment will be found. In Channel v. United States, 285 F.2d 217, 219, the Court said:

> "A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied."

In U.S. v. Gross, 137 F. Supp. 244,

District Judge Weinfeld stated:

> "In passing upon the issue of consent certain general principles should be noted. A waiver of a constitutional right is not be be lightly implied. Indeed, the courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the least for fundamental rights. Consent to search and seizure in deregation of one's constitutional right of privacy under the Fourth Amendment must be proved by clear and unequivocal evidence and it must appear that the consent was not the result of duress or coercion, actual or implied."

Where the person consenting is under arrest at the time of search, the voluntary nature of the consent is particularly suspect. (Judd v. U.S., 190 F.2d 649; Watson v. U.S., 249 F.2d 106.)

Where other coercive factors appear,

the unlikelihood of a free consent is strong.

In Villano v. U.S. (1962) 310 F.2d 680, there were threats to break into the store where defendant worked.

In Greenwell v. U.S. (1964) 336 F.2d, there was a delay in taking the defendant before the magistrate.

Clearly coercive factors affect the voluntariness of the consent.

The problem presented herein is the extent of the effect of these factors upon the petitioner.

There was delay in bringing the appellant before a U.S. magistrate.

Petitioner claimed he was made to wait approximately two hours to see the Assistant

U.S. Attorney.

His wife had informed him of presence of agents in the apartment.

His wife feared they would "wreck" the apartment.

The appellant's wife was pregnant.

The appellant's elderly mother was in the apartment.

Appellant claimed that he requested counsel.

Consent under all the circumstances must be inherently probable upon all the facts of the case, probable in common sense and in human experience.

From the petitioner's viewpoint it is clear that subjectively the consent was not

freely given.

Even assuming the facts are as stated by the agents, there is no contradiction of the petitioner's assertion that his wife told him that the agents were all over the apartment and they were going to tear it apart.

It is inherently difficult to speculate about what the reasonable man would have done when the circumstances suggest the presence of abnormal, unusual pressures.

Perhaps in recognition of this, the District Court apparently applied a modified objective test in ascertaining what the Court believed petitioner's state of mind reasonably was expected to be. This Honorable Court should specify the proper test to be applied in these unusual circumstances.

Question three deals with problem of

whether evidence of an aggravated escape, which is of minimal probative value as to the earlier substantive crime, was used in such a way to prejudice the accused at trial, in violation of due process. Question three also involves the failure of the Court to clarify in its jury charge that flight does not always reflect a consciousness of guilt and that a consciousness of guilt, or feelings of guilt, are not always evidence of actual guilt.

Whenever there is an escape, there is always an element of so-called derring-do.

Every escape has a certain quantity of risk.

Evidence of an escape to show the consciousness of guilt normally must have

some nexus of highly prejudicial conduct by the accused.

Always, caution must be the byword in presenting to the jury the evidence of an escape occurring subsequent to the criminal occurrences on trial.

Escape inherently creates rancor. The legal fictions which permit the introduction of later-escape evidence, are worthy of the Court's re-examination and re-definition.

Clearly where both Taillet's credibility is in issue, and where the jury may entertain some doubt of the petitioner's silence, an improper consideration of the law flight may have been the deciding factor.

The prosecution introduced evidence

of the escape of the appellant from the Federal Detention Headquarters in New York City.

Dummies were found in two beds according to the testimony and appellant was found in an elevator shaft.

A hacksaw blade was found and photos of the sawed bars of the cell were introduced.

The Court instructed the jury as follows:

> "In reference to the so-called escape or the flight or the concealment, whatever you want to call it, because in the beginning there was sort of concealment, and then he was hiding or was found in an elevator -- I don't know if he was hiding in it but in any event he was found in an elevator shaft -- this kind of conduct after the crime has been committed does not create a presumption of guilt. It is, however, a circumstance which may tend to prove consciousness of

guilt and should be considered and weighed by you in connection with all the other evidence in the case.

"The weight to be given to the evidence we are talking about -- namely, being found, and the dummy being put in the bunks, and so forth -- depends upon the motives which prompted it, and all of the surrounding facts and circumstances, and so you will have to make a judgment on that. Consider all the facts and circumstances and then come up with your own decision on that particular aspect!"

In the first place, the Court should not have permitted the highly prejudicial evidence of an apparently sophisticated jail escape to be admitted.

The escape involved sawed bars, a hacksaw blade, paper mache type dummies, with paint brush-bristle hair, and elevator

shaft concealment.

The Court failed to properly limit the nature of the evidence by any statement that escape is only slight evidence of guilt, as was suggested in U.S. v. Crisp, 435 F.2d 354 (1970) (P. 359).

In addition the Court failed to charge.

> "There are so many reasons for conduct consistent with innocence that it scarcely comes up to the standard of evidence tending to establish guilt * * *." As set forth in Ryan v. People, 79 N.Y. 593, 601 (1880).

In Alberty v. U.S., 162 U.S. 499 (511), 16 S. Ct. 864, 868, the Court stated:

> "It is not universally true that a man, who is conscious that he has done wrong will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent,

right and proper; since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Innocent men sometimes hesitate to confront a jury - not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves."

In Wong Sun v. U.S., 371 U.S. 471, 483-484, 83 S. Ct. 407, 415-416, the Supreme Court stated:

"[W]e have consistently doubted the probative value in criminal trials

of evidence that the accused fled the scene of an actual or supposed crime."

It is perhaps of even more importance that the District Court failed to instruct the jury that one who feels some guilt concerning an act has not always consciously committed that act.

As is stated in Miller v. U.S., 320 F.2d 767 (1963), at page 772-773:

"The observation that feelings of guilt may be present without actual guilt in so-called normal as well as neurotic people has been made by many recognized scholars and is a significant factor in the contemporary view of the dynamics of human behavior.

"It is not suggested that guilt feelings may not reflect actual guilt, but only that they do not always reflect it, and that Wigmore's commonly accepted opinion that 'guilty

consciousness' is 'the strongest evidence * * * that the person is indeed the guilty doer,' should not be elevated to an immutable principle either of law or human behavior.

"When evidence of flight has been introduced into a case, in my opinion the trial court should, if requested, explain to the jury, in appropriate language, that flight does not necessarily reflect feelings of guilt, and that feelings of guilt which are present in many innocent people, do not necessarily reflect actual guilt. This explanation may help the jury to understand and follow the instruction which should then be given, that they are not to presume guilt from flight; that they may, but need not, consider flight as one circumstance tending to show feelings of guilt; and that they may, but need not, consider feelings of guilt as evidence tending to show actual guilt." (emphasis added)

In light of the highly prejudicial evidence of the escape presented, the Court should have so charged the jury even without a request

by counsel.

In brief the charge was incomplete because the Court failed to inform the jury that "consciousness of guilt does not always reflect actual guilt" and that feelings of guilt are present in many innocent people.

Question Four involves the problem of inflammatory judicial comments on the subject matter of the offense and their effect upon the right to a fair and impartial jury.

The Court described heroin as a "horrible drug", which caused "leprosy of the will" and "created a monster".

The Court stated "all civilized communities have laws against this kind of drug."

"Our fight against narcotics . . ." was

the phrase used by the Court to introduce remarks which traced the history of Federal anti-drug legislation.

Characterizations of and reminiscences about the drug problem in our country have no proper place in instructions to a criminal jury.

Certainly the Court itself should avoid all avenues which interject emotionalism into the hopefully cool and dispassionate process by which the jury theoretically decides guilt.

The Court further drew the jury into the thrust of his remarks by alluding to a community of interest in "our fight" against drugs.

Having heard the Court's express denounciation of drugs and understanding its

normal and necessarily following implicit castigation of drug defendants, the jury may well have felt inclined to use the petitioner's case as a vehicle to strike back in "our fight", instead of giving the petitioner the objective evaluation to which he was entitled.

The trial judge is more than a mere moderator or umpire. He is charged with the duty of seeing that the trial is conducted properly from beginning to end. (Herron v. Southern Pacific Co., 283 U.S. 91, 51 S.Ct. 383, 75 L. Ed. 857).

The requirement of strict impartiality of the trial judge is basic to our system of justice. The reason was aptly set forth in United States v. Ah-Kee Eng, 241 F.2d 157,

161, as follows:

> ". . . the jury hangs on his every word and is most attentive to any indication of his view of the proceedings."

In Wilson v. United States, 250 F.2d 312, the Court elucidated the doctrine set down by the Supreme Court of the United States in Bollenbach v. United States, 326 U.S. 607:

> "It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way . . ."

Question Five presents the issue of the subtle but pervading prejudice which arises from the apparently innocent reference to an accused,

by an unwarranted "alias".

Several documents seized from the petitioner's home bore the name Winfredo Valentin.

The documents dealt with the purchase and operation of two new automobiles.

The evidence of the purchase of the two automobiles was at best peripheral and only in a tangential fashion could it be said to have affected the substantive issues of the trial.

The prosecution, however, seized upon the name Winfredo Valentin used in these papers, and presented it at trial as an alias that petitioner always used, after having first bestowed this name as an alias upon the

petitioner in the indictment.

Clearly the potential for prejudice is high and the probative value of such a name is nil, where unrelated to the trial issues.

The jury well may have considered the petitioner evil simply because he had an alias and thus possibly a criminal fingerprint record.

At the trial there was no evidence of continual or regular use by the defendant of this or any other alias, yet he was subjected to all of the commonly held prejudices against people who use fictitious names in the eyes and minds of the jury.

CONCLUSION

The petition for certiorari should be granted because:

1. The petitioner was deprived of a fair trial and due process of law when the prosecution permitted its main witness, an accomplice of the petitioner, to testify falsely without correction and thus creating a false portrayal of the witness' character, involvement and reliability to be presented to the jury.
2. The trial Court erred in improperly finding that the consent to a search of the home of the petitioner was unequivocal, free, and intelligently

given without duress and coercion contrary to the Fourth Amendment requirements.

3. The trial Court deprived the petitioner of a fair trial and due process of law by admitting highly prejudicial evidence of an escape, and failed to instruct the jury completely, and accurately that flight does not necessarily reflect guilt, and that consciousness or feelings of guilt are not evidence of actual guilt.

4. The petitioner was denied a fair trial and due process of law by jury involving and prejudicial comments from the Court upon the heinousness and evils

of heroin and drug crimes.

5. The petitioner was deprived of a fair trial and due process by the prosecutor unfairly and inappropriately bestowing an alias upon the petitioner in the indictment and at trial.

Respectfully submitted,

HENRY B. ROTHBLATT
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of March one thousand nine hundred and seventy-two.

Present:

HON. PAUL R. HAYS,

HON. WALTER R. MANSFIELD,

HON. WILLIAM H. MULLIGAN,

Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Antonio Segura a/k/a Winfredo Valentin,
Edmond Taillet, John Doe, a/k/a Loule,
Marcelle Asfez, Fernand Chaffard,
Francoise Bizard, Etienne Mosca,
Defendants,

Antonio Segura, a/k/a Winfredo Valentin,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is

now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. Daniel Fusaro

Clerk

71-2189

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- x

United States of America,
Plaintiff-Appellee,

v.

Antonio Segura a/k/a Winfredo Valentin, Edmont Taillet, John Doe, a/k/a Loule, Marcelle Asfez, Fernand Chaffard, Francoise Bizard, Etienne Mosca,
Defendants,

Antonio Segura, a/k/a Winfredo Valentin,
Defendant-Appellant.

- x

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it

hereby is denied.

June 2, 1972

/s/ William H. Mulligan

/s/ Walter R. Mansfield

/s/ Paul R. Hays
U.S.C.J.J.

71-2189

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- x

United States of America,
Plaintiff-Appellee,

v.

Antonio Segura a/k/a Winfredo Valentin, Edmont Taillet, John Doe, a/k/a Loule, Marcelle Asfez, Fernand Chaffard, Francoise Bizard, Etienne Mosca,
Defendants,

Antonio Segura, a/k/a Winfredo Valentin,
Defendant-Appellant.

- x

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having

requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ Henry J. Friendly
HENRY J. FRIENDLY
Chief Judge

June 2, 1972